

ORIGINAL



0000079736

BEFORE THE ARIZONA CORPORATION COMMISSION

Arizona Corporation Commission

COMMISSIONERS:

MIKE GLEASON – Chairman  
WILLIAM A. MUNDELL  
JEFF HATCH-MILLER  
KRISTIN K. MAYES  
GARY PIERCE

2007 DEC 12 P 3:41

DOCKETED

DEC 12 2007

DOCKETED BY

nr

In the matter of:

Docket No. S-20519A-07-0154

Owen A. Vilan and Lucina Vilan (aka Lucy Vilan),  
husband and wife,  
7523 E. Kael Circle  
Mesa, AZ 85207

RESPONDENTS' MOTION TO STAY  
PROCEEDING

Saguaro Investments, Inc., fka Vilan Enterprises,  
Inc., a Nevada corporation,  
7440 E. Main Street, Suite 2-B  
Mesa, AZ 85207

Respondents.

**I. PRELIMINARY STATEMENT**

Respondents Owen A. Vilan, Lucina Vilan and Saguaro Investments, Inc. fka Vilan Enterprises, Inc. (collectively, the "Vilan Respondents"), by and through their attorneys, respectfully submit this motion for a temporary stay of all proceedings against them in the above-captioned matter pending resolution of parallel criminal proceedings (Civil Case No. CR2007-019069; *State of Arizona v. Owen A. Vilan* in the Maricopa County Superior Court, the "Parallel Proceeding").

The basis for this motion is that the Parallel Proceeding involves the same factual issues alleged in the Temporary Order to Cease and Desist and Notice of Opportunity for Hearing ("Notice") filed by the Securities Division of the Arizona Corporation Commission on March 20, 2007 (the "Securities Division"). As a result, the Vilan Respondents cannot defend this action without incurring substantial prejudice and cost. In addition, staying this administrative proceeding will conserve judicial resources, increase the possibility for settlement, and will not prejudice the Securities Division. Therefore, the Vilan Respondents respectfully request that this proceeding be stayed pending resolution of the Parallel Proceeding, or until further order of the Hearing Officer.

## II. ARGUMENT

A stay of this administrative proceeding until the conclusion of the Parallel Proceeding is necessary to prevent the Vilan Respondents from being subjected to undue prejudice. The United States Supreme Court has held that a court does have the inherent authority to stay a civil case when the interests of justice so require. See Landis v. North American Co., 299 U.S. 248, 254-55 (1936); see also SEC v. Dresser Industries, 628 F.2d 1368, 1375 (D.C. Cir.), cert. denied, 449 U.S. 993 (1980). Many of the cases dealing with the stay of parallel proceedings arise where a civil and criminal case are pending at the same time. These cases are instructive as to why this administrative proceeding should be stayed.

The determination of whether to stay a civil proceeding pending a criminal action requires the Court to consider the particular circumstances and balance the interests involved in the case. Dresser Indus., 628 F.2d at 1375. Some of the factors the Court may consider in making such a determination include:

- (1) the extent to which the issues in the criminal case overlap with those presented in the civil case;
- (2) the status of the case, including whether the defendants have been indicted;
- (3) the private interests of the plaintiffs in proceeding expeditiously weighed against the prejudice to plaintiffs caused by the delay;
- (4) the private interests of and burden on the defendants;
- (5) the interests of the courts; and
- (6) the public interest.

Trustees of the Plumbers and Pipefitters National Pension Fund v. Transworld Mechanical, Inc., 886 F.Supp. 1134, 1139 (S.D.N.Y. 1995) (citations omitted). As discussed herein, good cause exists to stay this administrative proceeding.

**A. A Stay of this Administrative Proceeding is Appropriate Because the Issues Significantly Overlap.**

The most important factor in determining whether to grant a stay is the “degree to which the civil issues overlap with the criminal issues.” See e.g., Milton Pollack, Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 203 (S.D.N.Y. 1990). In the instant case, the Parallel Proceeding identically overlaps with the allegations and issues raised in the Notice. Thus, this factor undeniably weighs in favor of granting a stay.

**B. A Stay of this Administrative Proceeding is Necessary to Prevent the Vilan Respondents From Suffering Undue Prejudice.**

Citing the Ninth Circuit decision in Keating v. Office of Thrift Supervision, 45 F.3d 322, 324-25 (9<sup>th</sup> Cir. 1995), the court in Healthsouth Corp., enumerated the same set of factors identified above by other courts as relevant to the decision of whether to grant a stay, including “the interest of the plaintiff in proceeding expeditiously with this litigation and the potential prejudice to the plaintiffs from delay, the burden any particular aspect of the proceedings may impose on the defendant, the efficient use of judicial resources, the interests of persons not parties to the civil litigation and the interest of the public in the pending civil and criminal litigation.” See Healthsouth Corp., 261 F. Supp.2d 1298, 1326 (N.D.Ala. 2003).

Further, while the Healthsouth Corp. court found that the plaintiff SEC had an interest in an expeditious resolution of the civil case, the court also found that the harm to the defendant greatly outweighed the prejudice to the SEC. Id. The same harm confronts the Vilan Respondents in this case and surely outweighs whatever interest the Securities Division may have in resolution of this administrative proceeding before the Parallel Proceeding concludes.

**C. A Stay of the Administrative Proceeding Against the Respondents Will Not Unduly Prejudice the Securities Division.**

The Securities Division will not be unduly prejudiced by a stay of the administrative proceeding against the Vilan Respondents. In fact, a stay will more likely benefit the Securities

1 Division because the resolution of the Parallel Proceeding will sharpen the issues, preserve  
2 evidence, and may increase the possibility of a settlement.

3 The only foreseeable issue to the Securities Division in the granting of a stay would be  
4 delay. However, the Securities Division's interest in the resolution of this case pales in  
5 comparison to the prejudice that would befall the Vilan Respondents should a stay not be  
6 granted. Furthermore, Respondent Vilan is incarcerated and is already subject to a Cease and  
7 Desist Order that precludes him from, *inter alia*, violating the Arizona Securities Act. Thus, the  
8 Securities Division will not be unduly prejudiced by a delay. Furthermore, such a stay is  
9 warranted because of the risk of undue prejudice to the Vilan Respondents exponentially  
10 outweighs any inconvenience to the Securities Division that may result from a stay of this  
11 proceedings.

12 **D. Judicial Economy Warrants a Stay in the Administrative Proceeding.**

13 The concept of judicial economy is another factor which weighs in favor of granting a  
14 stay. Courts have held that the interests of judicial economy are best served by granting a stay in  
15 a civil action where the civil and criminal proceedings substantially overlap because the  
16 "resolution of the criminal case would moot, clarify, or otherwise affect various contentions in the  
17 civil case." United States v. Mellon Bank, NA, 545 F.2d 869, 873 (3rd Cir. 1976). This is also  
18 true here. No adverse impact will accrue to the Securities Division or the public if this matter is  
19 stayed. Furthermore, the likelihood of the necessity for a hearing will be greatly reduced if the  
20 matter is stayed pending resolution of the Parallel Proceeding.

21 The resources of the Commission's Hearing Officers should not be used at this time to  
22 pursue this administrative proceeding. This is particularly true when matters pending in other  
23 forums provide an opportunity for the issues to be litigated. The only remedies the Securities  
24 Division seeks which could not be awarded in the other forums are the order, administrative  
25 penalty and license revocation. Given Mr. Vilan is incarcerated and subject to a Cease and Desist  
26 Order precluding him from offering or selling securities in violation of the Arizona Securities Act,  
27 the issue of whether the Securities Division is entitled to these remedies can wait. The public is

1 protected. Because the issues raised by this proceeding and the Parallel Proceeding significantly  
2 overlap, a stay of this matter would serve the interests of judicial economy.

3 **E. A Stay of This Proceeding Will Not Harm the Public Interest.**

4 A stay of this proceeding also would not cause any injury to the public interest. Courts  
5 have held that a substantial danger to the public interest generally involves "a threat of immediate  
6 and serious harm to the public at large" that can be protected by a civil proceeding. Brock v.  
7 Tolkow, 109 F.R.D. 116, 120 (E.D.N.Y. 1985). There is no suggestion here that any harm will  
8 accrue to the public interest if this matter is stayed. As noted above, Mr. Vilan is barred from  
9 offering or selling securities, and is currently incarcerated. The public will suffer no harm if this  
10 proceeding is stayed.

11 **CONCLUSION**

12 For the foregoing reasons, the Vilan Respondents respectfully requests that the Hearing  
13 Officer enter a Procedural Order: (1) staying all proceedings against Respondents Owen Vilan,  
14 Lucina Vilan and Saguaro Investments, Inc., fka Vilan Enterprises, Inc. in this administrative  
15 proceeding pending the resolution of the Parallel Proceeding.

16 RESPECTFULLY SUBMITTED this 12th day of December, 2007.

17 ROSHKA DeWULF & PATTEN, PLC

18  
19 By 

20 Paul J. Roshka, Jr., Esq.  
21 Jeffrey D. Gardner, Esq.  
22 One Arizona Center  
23 400 East Van Buren Street, Suite 800  
24 Phoenix, Arizona 85004  
25 602-256-6100 (telephone)  
26 602-256-6800 (facsimile)  
27 Attorneys for Respondents

**ROSKA DEWULF & PATTEN, PLC**  
ONE ARIZONA CENTER  
400 EAST VAN BUREN STREET - SUITE 800  
PHOENIX, ARIZONA 85004  
TELEPHONE NO 602-256-6100  
FACSIMILE 602-256-6800

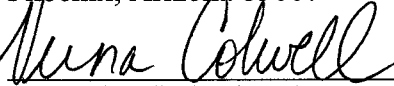
1 ORIGINAL and thirteen copies of the foregoing  
2 filed this 12th day of December, 2007 with:

3 Docket Control  
4 Arizona Corporation Commission  
5 1200 West Washington Street  
6 Phoenix, Arizona 85007

7 Copy of the foregoing hand-delivered  
8 this 12th day of December, 2007 to:

9 Marc E. Stern, Hearing Officer  
10 Hearing Division  
11 Arizona Corporation Commission  
12 1200 West Washington Street  
13 Phoenix, Arizona 85007

14 Shoshana O. Epstein  
15 Securities Division  
16 Arizona Corporation Commission  
17 1300 West Washington Street, 3rd Floor  
18 Phoenix, Arizona 85007

19 

20 Vilan.ACC\Pleadings\Motion to Stay Proceedings.doc